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No. 96-831

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

EDMUND M. MAHERN, TRUSTEE FOR MERCHANTS GRAIN, INC.,
Petitioner,

v.

MARK AND CHRIS ADKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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Respondents-Intervenors the Ohio Agricultural Commodity Depositors Fund and the Ohio Commodity Advisory Commission (collectively, "the Fund") conclude their brief in opposition by writing: "The trustee's ability to avoid the transfers 'rises and falls' on whether the Ohio statutory lien was valid. [Petition] at 10a." Brief in Opposition at 6.

That characterization is wrong. It ignores the federal-law half of the Seventh Circuit's analysis—precisely the half upon which this case now turns. In fact, the Seventh Circuit actually wrote, in the passage from which the Fund quotes, that the Petitioner's ability to avoid the transfers "rises or falls on whether the lien created by the Ohio statute was *both* valid under state law *and not prohibited under the Code*." Petition at 10a, emphasis supplied. The Fund omits from its quote (and, largely, from its brief)

reference to the critical second element—avoidability under federal law. However, it is that federal issue that the Seventh Circuit decided erroneously and that deserves this Court's attention.

This fundamental misapprehension aside, the Brief in Opposition also unfairly attempts to diminish the importance of the federal issue by suggesting that the fully-formed conflict among the circuits be allowed to "percolate," and seeks to play down the split among five circuits on this issue that the Seventh Circuit itself acknowledged.[1]

I. THE FUND WRONGLY ARGUES THAT THE STATE LAW VALIDITY OF ITS LIEN DETERMINES THE OUTCOME OF THIS CASE.

Rather than address them, the Fund asks the Court to overlook the important issues of federal law that lie at the heart of the decision below.

The Fund takes no issue with Petitioner's explanation in his Petition that Bankruptcy Code § 545 is the product of over 50 years of federal legislation aimed at balancing the rights of states to regulate their own commercial affairs against the need for uniformity and fair and equal distribution among the citizens of various states in multi-state bankruptcies. Neither does the Fund seek to reconcile the differences between Bankruptcy Code § 545 and Bankruptcy Code § 522 that make *Farrey v. Sanderfoot*, 500 U.S. 291 (1991), a § 522 case, inapplicable to § 545. Instead, the Fund concentrates on a state law issue that is not part of the Petition—the Seventh Circuit's interpretation of the Ohio lien statute (an interpretation not attacked in the Petition). On this, the Fund concludes:

> For even if section 545 permitted the avoidance of a lien, as opposed to the fixing of a lien, the lien

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[1] The Fund also wrongly disputes that the Ohio Department of Agriculture required MGI's Ohio grain be used to pay only Ohio creditors. Brief in Opposition at 1. In fact, the Bankruptcy Court so found. Petition at 40a, note 26.

was still valid under state law and therefore insulated from the Trustee's avoiding powers.

Brief in Opposition at 6.

The Fund's position ignores the Bankruptcy Code. A lien valid under state law may still be avoided if it falls within one of the categories of liens avoidable under the Bankruptcy Code, including the four categories described by § 545. In suggesting that the analysis begins and ends with state law, the Fund's argument proves too much by writing § 545 out of the Code.

The Seventh Circuit did not ignore this issue. Instead, it directly addressed § 545, relying on a new interpretation of that section to detour around the Trustee's right to avoid the liens in question under § 545(2). Were the Fund's analysis correct, the Seventh Circuit could have written a much shorter opinion, concluding that the lien's validity under state law ended the debate.

II. THE ISSUES ARE IMPORTANT ENOUGH TO MERIT REVIEW BY THIS COURT.

Proper and prompt resolution of these federal issues is important. If the Seventh Circuit decision stands, it will encourage state legislatures to model statutes after the Ohio statute in an attempt to give their own citizens a bankruptcy priority over creditors residing in other states.[2] That piecemeal result is just what the framers sought to avoid by giving Congress the express power to make uniform national bankruptcy law and what Congress sought to avoid by adopting § 545. Wide adoption of the Seventh Circuit's approach would directly undermine the uniformity of national bankruptcy distribution.

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[2] The Fund implies that because the Ohio statute would theoretically apply also to non-Ohio farmers selling grain in the State, no improper priority is created. Brief in Opposition at 1. This implication is false. The mere fact that some citizens from other states may incidentally benefit from the state-created priority does nothing to change the fact that it is a state-created priority that works in derogation of the uniform scheme of distribution created by the Bankruptcy Code.

The Fund argues that this Court should let the issue "percolate." Brief in Opposition at 6. However, this case does not call for percolation. The issue here is not a fact-sensitive problem that treatment by more courts under varied fact patterns will better define—as, for instance, in a Fourth Amendment case that may depend heavily on the facts of a challenged search. Instead, the issue is well-defined already. No amount of waiting will sharpen it. Moreover, guidance provided now will avoid years of uncertainty (and likely incorrect decisions, at least in the lower courts of the Seventh Circuit following Circuit law).

III. CONTRARY TO THE FUND'S SUGGESTION, THE CIRCUITS ARE NOW SPLIT ON WHETHER A STATE CAN DODGE § 545 BY A RELATION-BACK CLAUSE.

The Fund does acknowledge the Seventh Circuit's statement that its decision on the issue departs from that of the parties, the courts below in this case, and at least four *prior* decisions of other circuits. Brief in Opposition at 4-5. The Fund does not come to grips with the fact that every other Court publishing an opinion on point has applied § 545 in a manner precisely opposite to that now applied by the Seventh Circuit. This Court should measure conflict not by speculating about how another circuit may have decided a case under different law, but instead based on the way the circuits have actually interpreted and applied the statute in question. On that, the Seventh Circuit was right—its holding does digress from everything that has gone before. Petition at 17a.

The Seventh Circuit was not as sanguine in making this holding as the Fund is now in defending the decision. The Seventh Circuit readily acknowledged its disagreement with "[t]he Trustee, the farmers, both courts below, and many other court decisions." Petition at 17a. The Seventh Circuit admitted—indeed highlighted—the con-

flict among the circuits that its holding created.[3] If the Seventh Circuit was on the right track when it refused to apply § 545 to this case, then all the parties to this case, all the courts below, and at least four other circuits have been wrong on that same issue.

CONCLUSION

As the Trustee demonstrates in his Petition, this Court should grant certiorari to correct the Seventh Circuit's evisceration of the Congress' carefully constructed scheme of uniform and equal national distribution. The Seventh Circuit's holding allows a state to circumvent Bankruptcy Code § 545, and the universally-recognized federal goal of uniform and equal national bankruptcy distribution that lies behind it, by the simple expedient of writing a state priority statute that, even though enforceable only against assets of "failed" (insolvent) companies, bears a relation-back clause reciting that the lien granted "arises" on delivery of the commodity in question. This erroneous application of *Farrey v, Sanderfoot* to § 545 should be reversed now, before it has a chance to take root and undermine years of legislation, affect thousands of bankruptcy cases and misdirect millions of dollars in bankruptcy distributions.

Respectfully submitted,

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[3] The Fund itself acknowledged below that § 545 worked to avoid liens, not the "fixing" of liens. For example, in its brief to the Seventh Circuit, the Fund noted "Section 545 provides four situations where a trustee may avoid a statutory lien." Brief of Appellees at 28.